

STATE OF VERMONT  
PUBLIC SERVICE BOARD

Docket No. 7440

Petition of Entergy Nuclear Vermont Yankee, LLC, )  
and Entergy Nuclear Operations, Inc., for )  
amendment of their Certificates of Public Good and )  
other approvals required under 10 V.S.A. §§ 6501- )  
6504 and 30 V.S.A. §§ 231(a), 248 & 254, for )  
authority to continue after March 21, 2012, )  
operation of the Vermont Yankee Nuclear Power )  
Station, including the storage of spent-nuclear fuel – )

Order Entered: 3/1/2012

**ORDER RE MOTION TO DEFER PROCEEDINGS**

**I. INTRODUCTION**

On January 20, 2012, the United States District Court for the District of Vermont entered a Decision and Order in *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. v. Shumlin et al*, Docket No. 1:11-cv-99.

On January 31, 2012, Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (together, "Entergy VY"), filed with the Public Service Board ("Board") a Motion Seeking Issuance of a Final Decision and Order Granting CPG.

On February 1, 2012, the Board issued a memorandum requesting that parties file responses to Entergy VY's motion by March 2, 2012.

On February 14, 2012, the Board issued a notice of a status conference to be held on March 9, 2012.

On February 22, 2012, the Board issued a memorandum identifying additional, procedural issues to be addressed in the parties' March 2 responses.

On February 29, 2012, Entergy VY filed a Motion to Defer Proceedings or, in the Alternative, for an Enlargement of Time to Respond to Board Requests ("Motion to Defer"). In

the Motion to Defer, Entergy VY asks that the Board defer proceedings in this docket or, in the alternative, modify the schedule for responses to the issues identified in the Board's February 22 memorandum. In light of the looming March 2 filing deadline, the Board asked that parties file any responses to the Motion to Defer by March 1, 2012,

On March 1, the Department of Public Service ("Department"), the Agency of Natural Resources ("ANR"), Vermont Electric Cooperative, Inc. ("VEC"), the Conservation Law Foundation ("CLF"), the New England Coalition, Inc. ("NEC"), and the Vermont Public Interest Research Group ("VPIRG") each filed a response to the Motion to Defer.

In today's Order we extend the deadline to noon on March 7, 2012, for all parties to respond to the Board's February 22 memorandum. In all other respects we deny the Motion to Defer. The March 9 status conference will be held as scheduled.

## **II. POSITIONS OF THE PARTIES**

In its Motion to Defer, Entergy VY contends that good cause exists to defer the proceedings in this docket due to Entergy VY's filing of two motions in the federal District Court on February 27, 2012: (1) a motion for relief from judgment; and (2) an expedited motion for injunction pending appeal. Entergy maintains that the relief it seeks in its federal court motions:

bears directly upon the Board's questions posed in the February 22 Memorandum as well as upon this CPG [Certificate of Public Good] proceeding generally. It would be highly inefficient and wasteful for the Board and the parties to expend valuable time and resources addressing the questions posed in the February 22 Memorandum when the District Court may make a preemptive ruling foreclosing those inquiries by the Board altogether.<sup>1</sup>

If the Board does not defer these proceedings, Entergy VY requests in the alternative a modification to the schedule for filing responses to the February 22 memorandum, to provide "an orderly process for addressing those questions." Specifically, Entergy VY proposes:

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1. Entergy VY Motion to Defer at 3.

that the Board direct parties other than Entergy VY to file comments on March 2, 2012, as originally requested in the February 22 Memorandum. Entergy VY should then be allowed to file responsive comments on March 7, 2012. Other parties would then have an opportunity to address Entergy VY's comments at the March 9, 2012, Status Conference. Should the need arise, additional rounds of written comments could be scheduled after the March 9 Status Conference.<sup>2</sup>

The Department opposes Entergy VY's Motion to Defer. According to the Department, the federal District Court decision noted that it was not restricting the state's ability to decline issuance of a renewed CPG, and thus the Court's decision allows the current docket to proceed. The Department maintains that the Board's February 22 questions "will enable the Board to structure this proceeding in compliance with [the District Court's] injunction after input from the parties. Given its role as plaintiff in that case, Entergy should be prepared to answer those questions."<sup>3</sup> The Department also asserts that Entergy VY "has it backwards" in suggesting that the other parties file first, given that Entergy VY is the petitioner here and the plaintiff in the federal court proceeding. The Department recommends that to "sharpen the presentation of the issues," Entergy VY should be required to file its responses to the February 22 memorandum according to the existing schedule – i.e., by March 2 – with the other parties responding by March 7.

ANR and VEC support the Department's response.

CLF opposes Entergy VY's Motion to Defer, except for "a limited enlargement of time." CLF proposes that either all parties submit comments at the same time, or that Entergy VY, as the petitioner, should file on March 2 with other parties filing one week later.

NEC opposes Entergy VY's motion. NEC contends that the District Court's decision provides that the Board may proceed with its review of Entergy VY's request for a CPG, and that Entergy VY's February 27 federal motions do not provide any basis to defer this CPG review. NEC further asserts that there is no support for Entergy VY's proposal that the other parties file

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2. Entergy VY Motion to Defer at 3.

3. Department 3/1/12 Response at 4.

comments in advance of Entergy VY, given that Entergy VY is the applicant and that several of the Board's February 22 questions are directed to Entergy. NEC also maintains that Entergy VY has the ability and sufficient resources to respond to the February 22 questions.

VPIRG opposes deferral of these proceedings. VPIRG asserts that because it is not a party to the federal proceeding, deferral of this docket would deprive VPIRG (and the other parties to this docket who are not parties to the federal litigation) of the ability to be heard.

### **III. DISCUSSION**

For the reasons set forth below, we deny Entergy VY's requests to defer these proceedings and to require the other parties to file their comments in advance of Entergy VY's comments. We grant Entergy VY's request to extend the deadline for comments to noon on March 7, 2012, with the extended deadline applying to all parties, not just Entergy VY.

Addressing first Entergy VY's request to defer proceedings in this docket, Entergy VY has presented no compelling reasons for delay. Entergy VY claims that the federal District Court's rulings on Entergy VY's recent motions will clarify the issues. However, if the District Court determines that Entergy VY's new motions are premature until after this Board has acted, or otherwise does not rule by March 21, 2012, or rules but not in Entergy VY's favor, then Entergy VY, the other parties and this Board will have lost valuable time.

Furthermore, even if the federal District Court grants Entergy VY's motions, we would still lose valuable time in our review of Entergy VY's CPG request. The District Court expressly stated that its January 20 order does not "purport to define or restrict the State's ability to decline to renew a certificate of public good on any ground not preempted or not violative of federal law. . . ." <sup>4</sup> Thus, the District Court explicitly acknowledged that the Board's CPG review may proceed,<sup>5</sup> and Entergy VY has provided no basis for deferring this review.

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4. *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. v. Shumlin et al*, Docket No. 1:11-cv-99, slip. op. at 4 (D. Vt. Jan. 20, 2012).

5. The Court also observed that "Entergy's suit does not maintain that the resting of jurisdiction in the Board to grant or deny a CPG for continued operation is preempted." *Id.* at 94.

The District Court entered its final judgment on Entergy VY's federal complaint on January 20, 2012, prompting Entergy VY to file its motion in this docket for issuance of a final order and CPG. In response to Entergy VY's motion seeking a prompt decision in this docket, and in full recognition of the federal court's January 20 decision, the Board scheduled a status conference and asked Entergy VY and the other parties to address questions regarding: (1) how we should structure our state proceeding; (2) interpretation of state law; (3) CPGs and Orders that this Board has previously issued; and (4) the Memorandum of Understanding that Entergy VY entered into in Board Docket No. 6545 and that, by its own terms, provides that disputes thereunder are to be decided by the Board. These are issues that need to be addressed. Given that March 21 is now less than three weeks away, we conclude that all parties are best served by progress rather than delay in this proceeding. Therefore, we deny Entergy VY's request to defer action in this docket, especially in light of its original request that we issue a prompt decision on its CPG.

Turning to Entergy VY's request to modify the schedule for responses to the Board's February 22 memorandum, we find it reasonable to provide the parties with additional time to respond given the intervening event of Entergy VY's February 27 motions in federal court. However, we see no reason to grant Entergy VY's request that it be allowed to file after all other parties, and Entergy VY itself provides no rationale for its proposal that the other parties file their comments first. To the contrary, if filings were to be sequential Entergy VY should be the party to file first, given that it is Entergy VY who is the petitioner and who filed the motion seeking issuance of a final Board order and CPG. We would normally expect the petitioner and moving party to respond first to questions concerning the relief that it has requested, not second. As the moving party, Entergy VY should be in the best position to know what it wants, how it proposes to get there, and what it believes to be its legal rights. It should not be incumbent upon other parties to go first in defining how the moving party wants the Board to proceed.

For the reasons stated above, we deny Entergy VY's Motion to Defer, except that the deadline for all parties to file responses to the Board's February 22 memorandum shall be noon on March 7, 2012.

**SO ORDERED.**

Dated at Montpelier, Vermont, this 1st day of March, 2012.

<u>s/ James Volz</u>	)	
	)	PUBLIC SERVICE
	)	
<u>s/ David C. Coen</u>	)	BOARD
	)	
	)	OF VERMONT
<u>s/ John D. Burke</u>	)	

OFFICE OF THE CLERK

FILED: March 1, 2012

ATTEST: s/ Susan M. Hudson  
Clerk of the Board

*NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address psb.clerk@state.vt.us)*

*Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.*